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Supreme Court, U.S.
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No. 466 Misc.

BRIEF FOR RESPONDENT, KATHERINE M. DRIER,
IN OPPOSITION

IN THE

Supreme Court of the United States

October Term, 1947

BENNY BITCHER (ABON),

Petitioner,

vs.

KATHERINE M. DRIER, HAROLD G. ABON, MORRIS PLAN INDUSTRIAL BANK OF NEW YORK, STERN BROS., BONWIT-TELLER, GREAT LAKES STEEL COMPANY, AND HENRY MORGENTHAU, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BERNARD J. GALLAGHER,
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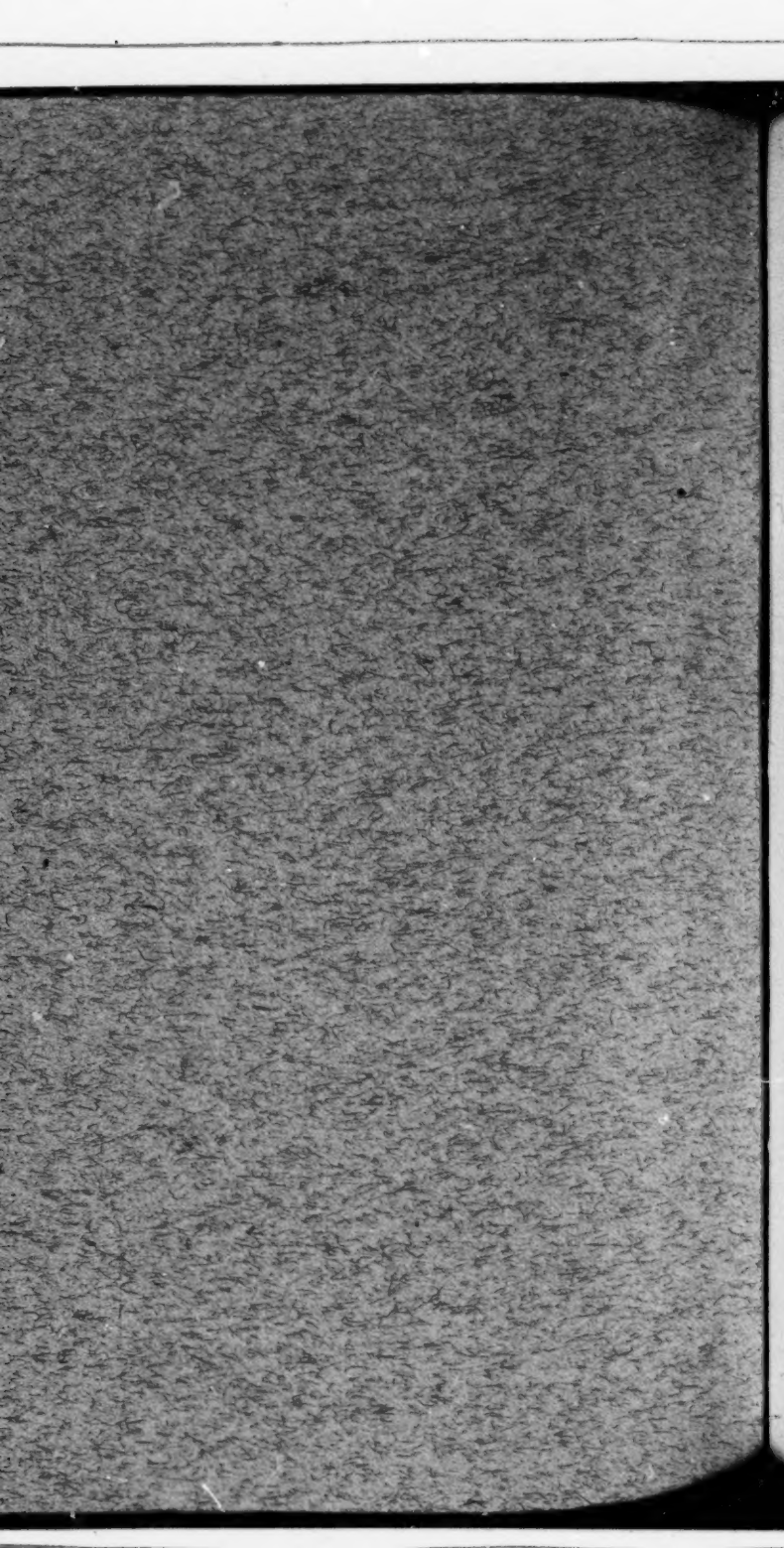

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BRIEF FOR RESPONDENT, KATHERINE M. DRIER, IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported at 165 Fed. (2d) 238 Advance Opinions.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia was entered December 8, 1947, affirming a judgment of the United States District Court for the District of Columbia, dated November 15, 1946. The petitioner's first petition for re-hearing in the United States Court of Appeals for the District of Columbia was denied January 7, 1948, and petitioner's second petition for rehearing was denied February 11, 1948. The petition for a writ of certiorari was filed on April 21, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. Section 347 (a)).

STATUTE INVOLVED

Private Law 509, 76th Congress, Third Session, approved July 19, 1940 (54 Stat. 1341).

QUESTIONS PRESENTED

1. Whether a contract by an attorney to procure from Congress the passage of "favor" legislation upon a contingent fee basis, is void as against public policy.

2. Whether there is a conflict between the opinion of the United States Court of Appeals for the District of Columbia in the instant case, on the one hand, and the United States Supreme Court in *Steele* v. *Drummond* 275 U. S. 199, 48 S. Ct. 53, 72 L. Ed. 238 and *Ewing* v. *National Airport Corp.* 115 Fed. (2d) 859, on the other hand.

All the other questions presented by the petitioner are extraneous for the reason that, as found by the United States Court of Appeals for the District of Columbia, the claims of petitioner are derivative and depend solely upon

the existence of a valid contract to procure favor legislation on a contingent fee basis.

STATEMENT

The petitioner's claim in this case is derivative. She is the divorced wife of one Aron. Aron, an attorney, acted for respondent, Drier, in procuring the passage by Congress of Private Law No. 509, upon a contingent fee basis, viz., a sum equal to twenty-five per cent (25%) of the amount recovered. Petitioner herein claims an interest in Aron's contingent fee. Other than that she has no claim against respondent Drier (Rec., Opinion of the United States Court of Appeals for the District of Columbia). Private Law 509 was "favor" legislation. (Rec., Opinion of the United States Court of Appeals for the District of Columbia).

ARGUMENT

The question involved here has been decided many times by this Court and by other Courts, all of whom have uniformly held that such a contract as is involved here is void as against public policy.

This Court said in *Providence Tool Company* v. *Norris*, 2 Wall. 45, 54, 55, 17 L. Ed. 868:

> "Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception. There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements."

This statement of the law was approved by this Court in *Crocker* v. *United States* 240 U. S. 74, 38 S. Ct. 245, 60 L. Ed. 533. Indeed the approval of the rule, in this class of cases, seems to be without exception. *Trist* v. *Child* 88 U. S. 441, 21 Wall. 441, 22 L. Ed. 623; *Meguire* v. *Corwine* 101 U. S. 108, 25 L. Ed. 899; *Oscanyan* v. *Winchester Repeating Arms Company* 103 U. S. 261, 273, 26 L. Ed. 539; *Sage* v. *Hampe,* 235 U. S. 99, 105, 35 S. Ct. 94, 59 L. Ed. 147.

Petitioner contends, however, that there is a conflict between the decision of the United States Court of Appeals for the District of Columbia in this case and the decision of the Supreme Court of the United States in *Steele* v. *Drummond,* supra, and in the decision of the Fourth Circuit Court of Appeals in *Ewing* v. *National Airport Corp.,* supra. It is perfectly apparent from reading these cases that they are not in conflict: On the contrary, they are in harmony with the decisions of the United States Court of Appeals for the District of Columbia in the instant case.

In the case of *Gesellschaft* v. *Brown,* 64 App. D. C. 357, 78 Fed (2d) 410, cited by the United States Court of Appeals for the District of Columbia in the instant case, the United States Court of Appeals for the District of Columbia cited the Supreme Court cases of *Crocker* v. *United States,* supra; *Trist* v. *Child,* supra, *Meguire* v. *Corwine,* supra, *Oscanyan* v. *Winchester Repeating Arms Company,* supra, and *Sage* v. *Hampe,* supra, in support of its opinion that contracts for the procuring of favor legislation on a contingent basis were void as against public policy. In *Steele* v. *Drummond,* supra, this Court held that the contract in the case of *Steele* v. *Drummond* is to be distinguished from those dealt with in *Providence Tool Company* v. *Norris,* supra, *Trist* v. *Child,* supra, and other cases, supra, relied upon by the United States Court of Appeals for the District of Columbia in support of its opinion that contracts for securing favor legislation on a contingent basis were

void as against public policy; and, in referring to these same cases, this Court stated in *Steele* v. *Drummond*, supra, as follows:

> "The claims there considered were under contracts requiring or contemplating the obtaining of legislative or executive action as a matter of favor by means of personal influence, solicitation and the like, or by other improper or corrupt means."

This statement of this Court in the case of *Steele* v. *Drummond*, supra, is in harmony with the decisions of the United States Court of Appeals for the District of Columbia, in the instant case, in holding that contracts which required or contemplated obtaining favor legislation on a contingent basis are void as against public policy. The fact that this Court held in the case of *Steele v. Drummond*, supra, that the contract in that case was to be distinguished from the contracts in the cases relied upon by the United States Court of Appeals for the District of Columbia in the instant case and hereinbefore cited, conclusively shows that this Court itself has already held that there was no conflict between the decision of this Court in *Steele* v. *Drummond* and the opinion of the United States Court of Appeals for the District of Columbia in the instant case. In the case of *Steele* v. *Drummond*, this Court specifically held that the contract in the *Drummond* case was to be distinguished from contracts for obtaining favor legislation on a contingent fee basis, for the reason that Drummond was not employed to secure the passage of the legislation. In this respect, this Court stated in the case of *Steele* v. *Drummond*:

> "But this case is different. Drummond was not employed by Steele or by the railroad company to secure the passage of the ordinances. He was interested as an owner of property. Neither the contract, nor what was done, suggests that the location or construction of the proposed line was not a legitimate enterprise undertaken for the public good, or that anything improper was contemplated as a means to secure the passage of the ordinances."

Neither is there any conflict between the decision of the United States Court of Appeals for the District of Columbia in the instant case and the case of *Ewing* v. *National Airport Corp.*, supra. In that case the Court held that because the plaintiff in securing the passage of the legislation in question used personal and political influence, the contract for such employment was void as against public policy. The decision of the United States Court of Appeals for the District of Columbia in the instant case does not hold to the contrary but, on the other hand, likewise holds that such contracts are against public policy and void. As further proof of the lack of conflict, the Circuit Court of Appeals for the Fourth Circuit, in the *Ewing* case, supra, cited the opinion of the United States Court of Appeals for the District of Columbia, in the case of *Gesellschaft* v. *Brown*, supra, the same case relied upon by the United States Court of Appeals for the District of Columbia, in the instant case and, also, cited the case of *Providence Tool Company* v. *Norris*, supra, which case was likewise cited with approval by the United States Court of Appeals for the District of Columbia in the case of *Gesellschaft* v. *Brown*, supra.

Thus it will be seen that this Court itself has by implication held that there was no conflict between the decision of the United States Court of Appeals for the District of Columbia in the instant case and its decision in the case of *Steele* v. *Drummond*, supra, by actually distinguishing the case of *Steele* v. *Drummond* from the cases relied upon by the United States Court of Appeals for the District of Columbia in the case of *Gesellschaft* v. *Brown*, supra. Not only that, but the United States Court of Appeals for the District of Columbia cites with approval and relies upon the decision of this Court in the case of *Steele* v. *Drummond*, supra; and, in the case of *Ewing* v. *National Airport Corp.*, the Circuit Court of Appeals, Fourth Circuit cited with approval the opinions of the United States Court of Appeals for the District of Columbia in *Gesellschaft* v. *Brown*, supra, and cases therein cited, all of which shows that there

is complete harmony and no conflict whatsoever between the decisions of the United States Court of Appeals for the District of Columbia and the cases of *Steele* v. *Drummond* and *Ewing* v. *National Airport Corp.*, supra.

Finally, it will be noted that the petitioner in the instant case has failed to notify this Court that in the case of *Gesellschaft* v. *Brown*, supra, an application was made to this Court for a writ of certiorari but the writ was denied 296 U. S. 618, 80 L. Ed. 439, rehearing denied, 56 S. Ct. 169, 296 U. S. 663, 80 L. Ed. 472. The contract in the case of *Gesellschaft* v. *Brown* was identical with the contract in the instant case; that is to say, a contract to obtain favor legislation upon a continget basis; and the United States Court of Appeals for the District of Columbia cited the case of *Gesellschaft* v. *Brown*, supra, in support of its opinion in the instant case.

It is clear, therefore, that the same question involved in the instant case has previously been submitted to this Court on a petition for writ of certiorari, and the writ was denied.

CONCLUSION

The decision below is clearly correct and there is no conflict. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

BERNARD J. GALLAGHER,
M. WALTON HENDRY,
J. ROY THOMPSON, JR.,

Attorneys for Respondent, Drier.

APPENDIX

Statute:

Private Law 509, approved July 19, 1940:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding the provisions of section 4(c) of the Settlement of War Claims Act of 1928, the Secretary of the Treasury is hereby authorized and directed to pay, out of the German special deposit account in the Treasury of the United States, to Katherine M. Drier, an American citizen, formerly resident in Germany, the sum of $160,000, together with interest thereon at the rate of 5 per centum per annum from January 1, 1920, being the amount due said Katherine M. Drier pursuant to an agreement between the United States of America and the German Government under which all the claims of said Katherine M. Drier against the German Government were settled and adjusted: Provided, That payment of such sum of $160,000 and interest thereon as herein provided shall be made as if an additional award in the sum of $160,000 with interest at 5 per centum per annum from January 1, 1920, had been entered by the Mixed Claims Commission, United States and Germany, on behalf of Katherine M. Drier.

"Approved July 19, 1940."